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CPLR 3213: Surety's Labor and Material Bond Deemed Not To Constitute an Instrument for the Payment of Money Only

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the plaintiff . . . can prove he was free from contributory negligence merely because the passenger who sued him in the first action was unable to establish his negligence by a fair preponderance of the evidence."¹¹⁷ Thus, although plaintiff might be entitled to partial summary judgment on the issue of defendant's negligence,¹¹⁸ he would have the burden of proving his own freedom from contributory negligence, and if the evidence were evenly balanced, defendant would be entitled to judgment in his favor.

CPLR 3213: Surety's labor and material bond deemed not to constitute an instrument for the payment of money only.

Although CPLR 3213 has already been the subject of three amendments, it is not yet clear what is encompassed by the phrase "instrument for the payment of money only."¹¹⁹ At least, that is the overall impression yielded by an examination of the cases arising under this section.¹²⁰ That a negotiable instrument qualifies as a presumptively meritorious claim is certain.¹²¹ But, beyond this it is difficult to predict whether a particular instrument will meet the court's definition of a money-only instrument. Perhaps the most well-received criterion advanced thus far is that an instrument is susceptible to 3213 treatment if a prima facie case is established by proof of the instrument and a failure to make the payments prescribed thereunder.¹²²

In *Kipp Brothers, Inc. v. Hartford Accident & Indemnity Co.*¹²³ the Supreme Court, Westchester County, ruled that a labor and material bond executed by defendant as surety is not the type of instrument envisioned by the draftsmen of CPLR 3213. The court reasoned that although plaintiff had a direct action against the surety, the latter's obligation was secondary to the principal's duty of performance and only arises when the principal breaches its obligation. Since proof of facts extraneous to the bond would thus be necessary to establish a

¹¹⁷ *Id.* at 959, 312 N.Y.S.2d at 768.

¹¹⁸ CPLR 3212 (e); cf. *De Paul v. George*, 34 App. Div. 2d 620, 309 N.Y.S.2d 90 (1st Dep't 1970), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 358 (1970).

¹¹⁹ The construction problems arising under CPLR 3213 are due in part to the fact that similar relief did not exist under the CPA. In addition, the legislative reports on the section are silent as to what instruments the section was intended to encompass. See FIRST REP. 91; FIFTH REP. 492; SIXTH REP. 338.

¹²⁰ For a discussion of cases arising under this section, see H. PETERFREUND & J. McLAUGHLIN, *NEW YORK PRACTICE* 860 (2d ed. 1968); *The Quarterly Survey*, 45 ST. JOHN'S L. REV., 359, 160 (1970); *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 335 (1969).

¹²¹ *Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968).

¹²² *Id.*

¹²³ 63 Misc. 2d 788, 314 N.Y.S.2d 89 (Sup. Ct. Westchester County 1970).

prima facie case the court properly concluded that a 3213 motion did not lie.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5208: Sheriff is permitted to sell real property after judgment debtor's death provided that execution was issued before death.

CPLR 5208 provides that "after the death of a judgment debtor, an execution upon a money judgment shall not be levied upon . . . any property in which he has an interest, nor shall any enforcement procedure be undertaken with respect to such . . . property, except upon leave of the surrogate's court." In *Oysterman's Bank & Trust Co. v. Weeks*,¹²⁴ the Appellate Division, Second Department, held that as long as an execution on real property has been issued before the death of the judgment debtor, CPLR 5208 does not prevent the completion of the enforcement procedure by publication and sale after the judgment debtor's death.

In *Oysterman's* a judgment was entered against defendant, Weeks, on August 1, 1968, and was docketed in Suffolk County one week later. On December 13, 1968, an execution was issued to the sheriff of Suffolk County against defendant's interest in certain real property which was situated there. Defendant died on May 13, 1969. When the sheriff advertised the property for sale in September of 1969, the instant proceeding was commenced to stay the sale.¹²⁵

The court focused on two phrases contained in CPLR 5208: "an execution . . . shall not be levied upon"¹²⁶ and no "enforcement procedure shall be undertaken." With regard to the first phrase, the court was convinced that the sheriff was not attempting to levy on the execution. Since a judgment is a lien upon real property in the county where it is docketed,¹²⁷ it was not necessary for the sheriff to make a formal levy before he sold the property.¹²⁸ With regard to the second phrase, the court reasoned that the sheriff had not *undertaken* any enforcement

¹²⁴ 35 App. Div. 2d 580, 313 N.Y.S.2d 535 (2d Dep't 1970).

¹²⁵ If prior law is adopted, an attempt at sale in contravention of section 5208 will be treated as a nullity. 6 WK&M ¶ 5208.10, citing *Prentiss v. Bowden*, 145 N.Y. 342, 40 N.E. 13 (1895).

¹²⁶ As originally proposed, the phrase read thusly: "an execution upon a money judgment shall not be issued . . ." THIRD REP. 126. The wording of the section was altered in an attempt to resolve problems raised in *Wood v. Morehouse*, 45 N.Y. 368 (1871). FINAL REP. A-198. In *Wood* the Court of Appeals ruled that the death of the judgment debtor after an execution had been issued would not affect its validity. It should be noted, however, that *Wood* was limited to the facts at hand: the case involved realty and the sheriff had commenced sale proceedings prior to the debtor's death. 6 WK&M ¶ 5208.05.

¹²⁷ CPLR 5203(a).

¹²⁸ *Wood v. Colvin*, 5 Hill 228 (1843); see also 9 CARMODY-WAIT 2D CYCLOPEDIA OF NEW YORK PRACTICE § 64:159 (1966).